

No. 47988-5

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Patrick Cuzdey,
Plaintiff/Appellant,

v.

Patricia Landes, et al.,
Defendant/Respondent

AMENDED BRIEF OF RESPONDENT

By:

Drew Mazzeo
TAYLOR LAW GROUP, P.S.
6510 Capitol Blvd SE
Tumwater, WA 98501
(360) 705-9000
WSBA #46506

Attorney for Respondent

TABLE OF CONTENTS

I. INTRODUCTION	1
II. RESTATEMENT OF THE ISSUES	2
III. STANDARD OF REVIEW	3
IV. ISSUE #1 RESTATED	3
4.1. Issue #1 Restatement of the Facts and Procedural History	4
4.2. Issue #1 Summary of the Argument.....	4
4.3. Issue #1 Argument	4
4.3.1. Mr. Cuzdey Has Waived and Abandoned Issues	4
4.3.2. Mr. Cuzdey Has Not Adequately Briefed Issues	5
V. ISSUE #2 RESTATED	6
5.1. Issue #2 Restatement of the Case: Facts and Relevant Procedural History	6
5.2. Issue #2 Summary of the Argument.....	12
5.3. Issue #2 Argument	12
VI. ISSUE #3 RESTATED	14
6.1. Issue #3 Relevant Facts and Procedural History.....	14
6.2. Issue #3 Summary of the Argument.....	14
6.3. Issue #3 Argument	15
6.3.1. No Part Performance.....	15
6.3.2. Contract Longer Than One Year.....	16
VII. ISSUE #4 RESTATED	17
7.1. Issue #4 Relevant Facts and Procedural History.....	17
7.2. Issue #4 Summary of the Argument.....	17
7.3. Issue #4 Argument	17
7.3.1. Quiet Title and Statute of Limitations	18

7.3.2. Accrual and Alleged New Promises	20
7.3.3. Quantum Meruit, Unjust Enrichment, Conversion, and Constructive Trust	24
VIII. ISSUE #5 RESTATED	24
8.1. Issue #5 Relevant Facts and Procedural History.....	24
8.2. Issue #5 Summary of the Argument.....	24
8.3. Issue #5 Argument	25
IX. ISSUE #6 RESTATED	26
9.1. Issue #6 Relevant Facts and Procedural History.....	26
9.2. Issue #6 Summary of the Argument.....	28
9.3. Issue #6 Argument	28
9.3.1. Authentication of Documentary Evidence	29
9.3.2. Mrs. Landes Demonstrated a Lack of Required Evidence, as to Mr. Cuzdey's Claims, Requiring Him to Present Sufficient Evidence to Rebut Her Contentions	31
9.3.2.1. No Oral Contract.....	31
9.3.2.2. No Exclusivity and No Hostility.....	34
9.3.2.3. Quantum Meruit.....	35
9.3.2.4. Constructive Trust.....	36
9.3.2.5. Conversion	38
9.3.2.6. Unjust Enrichment	38
X. ISSUE #7 RESTATED	39
10.1. Issue #7 Relevant Facts and Procedural History.....	39
10.2. Issue #7 Summary of the Argument.....	40
10.3. Issue #7 Argument	41
10.3.1. No Waiver of Deadman's Statute via Declaration Attached to Original MSJ	41

10.3.2. No Waiver of Deadman’s Statute via Attorney’s Argument in a Motion	42
10.3.3. No Exception to Deadman’s Statutes Saves Mr. Cuzdey’s Declaration	43
10.3.4. Mr. Cuzdey’s Declaration is Inadmissible Based on Other Evidentiary Rules	45
10.3.5. Arguendo, Whatever Portion of Mr. Cuzdey’s Declaration Deemed Admissible Does Not Raise Material Issues of Law or Fact	46
XI. ISSUE #8 RESTATED	47
11.1. Issue #8 Relevant Facts and Procedural History.....	47
11.2. Issue #8 Summary of the Argument.....	47
11.3. Issue #8 Argument	47
XII. ISSUE #9 RESTATED	50
XIII. ATTORNEY FEES ON APPEAL	50
XIV. CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<u>Anderson v. Hudak</u> , 80 Wn.App. 398 (1985)	34
<u>Arneman v. Arneman</u> , 43 Wash. 2d 787, 264 P.2d 256 (1953).....	24
<u>Becker v. Washington State University</u> , 165 Wash. App. 235, 266 P.3d 893 (Div. 3 2011), <u>review denied</u> , 173 Wash. 2d 1033, 277 P.3d 668 (2012).....	passim
<u>Boettcher v. Busse</u> , 45 Wn.2d 579 (1954)	43, 45
<u>Carlson v. Gibraltar Sav. of Washington, F.A.</u> , 50 Wash. App. 424, 749 P.2d 697 (1988).....	3, 12, 13, 14
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317, 1 06 S.Ct. 2548 (1986).....	28, 46
<u>Chau v. City of Seattle</u> , 60 Wash.App. 115, 802 P.2d 822 (1991).....	25
<u>Christensen v. Grant County Hospital Dist. No. 1</u> , 152 Wn.2d 299, 96P.3d 957 (2004).....	25
<u>Cofer v. Pierce Cnty.</u> , 8 Wash. App. 258, 505 P.2d 476 (1973).....	29
<u>Consulting Overseas Mgmt., Ltd. v. Shtikel</u> , 105 Wash. App. 80, 18 P.3d 1144 (2001).....	38
<u>Cowiche Canyon Conservancy v. Bosley</u> , 118 Wash. 2 d 801, 828 P.2d 549 (1992).....	4, 5
<u>Culligan v. Old Nat. Bank of Wash.</u> , 1 Wash. App. 892, 465 P.2d 190 (Div. 3 1970).....	19
<u>Cushing v. City of Spokane</u> , 45 Wash. 193, 87 P. 1121 (1906).....	20

<u>Davenport v. Washington Educ. Ass'n</u> , 147 Wash. App. 704, 197 P.3d 686 (Div. 2 2008).....	24, 38
<u>Doyle v. Hicks</u> , 78 Wn.App. 538, 897 P.2d 420 (1995).....	34
<u>Dwelley v. Chesterfield</u> , 88 Wash. 2d 331, 560 P.2d 353 (1977).....	43, 44
<u>Eagle Group, Inc. v. Pullen</u> , 114 Wn. App. 409, 58 P.3d 292 (2002).....	3, 21
<u>Eckert v. Skagit Corp.</u> , 20 Wash. App. 849, 583 P.2d 1239 (Div. 1 1978).....	20
<u>Emmerson v. Weilep</u> , 126 Wash. App. 930, 110 P.3d 214 (2005).....	4, 34
<u>Erickson v. Robert F. Kerr, M.D., P.S., Inc.</u> , 125 Wn.2d 183, 883 P.2d 313 (1994).....	43
<u>Estate of Lennon v. Lennon</u> , 108 Wash. App. 167, 29 P.3d 1258 (2001), <u>as amended on denial of reconsideration</u> (Oct. 2, 2001).....	41, 42
<u>Georges v. Loutsis</u> , 20 Wash.2d 92, 145 P.2d 901 (1944).....	15, 37
<u>Goldsworthy v. Oliver</u> , 93 Wash. 67, 160 P. 4 (1916).....	44, 45
<u>Goodman v. Goodman</u> , 128 Wash. 2d 366, 907 P.2d 290 (1995).....	24
<u>Granville Condo. Homeowners Ass'n v. Kuehner</u> , 177 Wn. App. 543, 312 P.3d 702 (2013).....	35
<u>Halbert v. Forney</u> , 88 Wash. App. 669, 945 P.2d 1137 (Div. 1 1997).....	passim

<u>Hampton v. Gilleland</u> , 61 Wn.2d 537, 379 P.2d 194 (1963).....	43
<u>Harberd v. City of Kettle Falls</u> , 120 Wash. App. 498, 84 P.3d 1241 (2004).....	41, 46
<u>Hart v. Clark County</u> , 52 Wash. App. 113, 758 P.2d 515 (Div. 2 1988).....	24
<u>Havens v. C & D Plastics, Inc.</u> , 124 Wash. 2d 158, 876 P.2d 435 (1994).....	3
<u>Herr v. Herr</u> , 35 Wash. 2d 164, 211 P.2d 710 (1949).....	42
<u>Hestagen v. Harby</u> , 78 Wash.2d 934, 481 P.2d 438 (1971).....	36, 37
<u>Hiatt v. Walker Chevrolet Co.</u> , 120 Wash. 2d 57, 837 P.2d 618 (1992).....	5, 6
<u>In re Kelly and Moesslang</u> , 170 Wash. App. 722, 287 P.3d 12 (Div. 3 2012), <u>review denied</u> , 176 Wash. 2d 1018, 297 P.3d 706 (2013).....	20
<u>In re Relationship of Eggers</u> , 30 Wash. App. 867, 638 P.2d 1267 (Div. 3 1982).....	19
<u>In re Wittman's Estate</u> , 58 Wash. 2d 841, 365 P.2d 17 (1961).....	21, 22, 23
<u>ITT Rayonier, Inc. V. Bell</u> , 112 Wn.2d 754, 774 P.2d 6 (1989).....	34
<u>Jewett v. Budwick</u> , 145 Wash. 405, 260 P. 247 (1927).....	44
<u>Johnston v. Johnston</u> , 182 Wash. 573, 47 P.2d 1048 (1935).....	35, 39

<u>Kellar v. Estate of Kellar</u> , 172 Wn.App. 562, 291 P.3d 906 (2012).....	3, 42
<u>Kelly v. Allianz Life Ins. Co. of N. Am.</u> , 178 Wash. App. 395, 314 P.3d 755 (2013).....	17, 20, 22
<u>Kobza v. Tripp</u> , 105 Wash. App. 90, 18 P.3d 621 (2001).....	18, 20
<u>Lokan & Associates, Inc. v. Am. Beef Processing, LLC</u> , 177 Wash. App. 490, 311 P.3d 1285 (2013).....	21, 23
<u>Marincovich v. Tarabochia</u> , 114 Wn.2d 271, 787 P.2d 562 (1990).....	46
<u>Nilson v. Castle Rock School Dist.</u> , 88 Wash. App. 627, 945 P.2d 765 (Div. 2 1997).....	19
<u>Norcon Builders, LLC, v. GMP Homes VG, LLC</u> , 161 Wn.App. 474, 254 P.3d 835 (2011).....	39
<u>O'Steen v. Wineberg's Estate</u> , 30 Wash. App. 923, 640 P.2d 28 (1982).....	44
<u>Pardee v. Jolly</u> , 163 Wash.2d 558, 182 P.3d 967 (2008).....	15
<u>Pearl v. City of Long Beach</u> , 296 F.3d 76, 89 (2d Cir. 2002).....	18
<u>Petersen v. Schafer</u> , 42 Wash. App. 281, 709 P.2d 813 (1985).....	19
<u>Pitman v. Smith</u> , 158 Wash. 467, 291 P. 334 (1930).....	15
<u>Pitzer v. Union Bank of California</u> , 141 Wash. 2d 539, 9 P.3d 805 (2000).....	36, 37
<u>Puget Sound Plywood, Inc. v. Mester</u> , 86 Wash. 2d 135, 542 P.2d 756 (1975).....	5

<u>Riley v. Andres</u> , 107 Wn.App. 391, 27 P.3d 618 (2001).....	34
<u>Sacco v. Sacco</u> , 114 Wash. 2d 1, 784 P.2d 1266 (1990).....	5
<u>Saluteen-Maschersky v. Countrywide Funding Corp.</u> , 105 Wash. App. 846, 22 P.3d 804 (Div. 1 2001).....	32, 33
<u>Sea-Van Investments Associates v. Hamilton</u> , 125 Wn.2d 120, 881 P.2d 1035 (1994).....	32, 33, 34, 49
<u>Shepard v. Holmes</u> , 185 Wash. App. 730, 345 P.3d 786 (2014).....	21, 22, 23
<u>Siekawitch v. Washington Beef Producers, Inc.</u> , 58 Wash. App. 454, 793 P.2d 994 (Div. 3 1990).....	31
<u>Smith v. King</u> , 106 Wash. 2d 443, 722 P.2d 796 (1986).....	5
<u>State v. Karpenski</u> , 94 Wash. App. 80, 971 P.2d 553 (1999) abrogated by <u>State v. C.J.</u> , 148 Wash. 2d 672, 63 P.3d 765 (2003).....	47
<u>State v. Martinez</u> , 105 Wash. App. 775, 20 P.3d 1062 (2001) <u>overruled on other grounds</u> by <u>State v. Rangel-Reyes</u> , 119 Wash. App. 494, 81 P.3d 157 (2003).....	45
<u>State v. Mayes</u> , 20 Wash.App. 184, 579 P.2d 999, <u>review denied</u> , 91 Wash.2d 1001 (1978)	5
<u>State v. Roberts</u> , 73 Wn.App 141, 867 P.2d 697 (1994).....	29, 31
<u>State v. Scriver</u> , 20 Wash. App. 388, 580 P.2d 265 (Div. 1 1978).....	29, 31
<u>State v. Stubsjoen</u> , 48 Wash. App. 139, 738 P.2d 306 (1987).....	45

//

<u>State v. Williams</u> , 136 Wash. App. 486, 150 P.3d 111 (2007).....	30
<u>Strong v. Clark</u> , 56 Wn.2d 230, 352 P.2d 183 (Wash. 1960).....	21, 22, 23
<u>Thor v. McDearmid</u> , 63 Wash. App. 193, 817 P.2d 1380 (1991).....	48
<u>Trethewey v. Bancroft-Whitney Co.</u> , 13 Wash. App. 353, 534 P.2d 1382 (1975).....	15, 16
<u>Trotzer v. Vig</u> , 149 Wash. App. 594, 203 P.3d 1056 (Div. 2 2009).....	31
<u>Turpen v. Johnson</u> , 26 Wash. 2d 716, 175 P.2d 495 (1946).....	19
<u>U.S. v. Bello-Perez</u> , 977 F.2d 664 (1st Cir. 1992)	31
<u>United States v. Gordon</u> , 634 F.2d 639 (1st Cir. 1980)	30
<u>Walcker v. Benson & McLaughlin, P.S.</u> , 79 Wash. App. 739, 904 P.2d 1176 (1995).....	18, 20
<u>Wildman v. Taylor</u> , 46 Wash. App. 546, 731 P.2d 541 (1987).....	43
<u>Young v. Key Pharmaceuticals, Inc.</u> , 112 Wash.2d 216, 770 P.2d 182 (1989)	28, 46

Statutes

RCW 4.16.080	24
RCW 4.84.185	50
RCW 11.62.010	23

RCW 11.96.060	24
RCW 82.29A.020.....	16

Other Authorities

<u>Courtroom Handbook on Washington Evidence,</u> Karl B. Tegland (2007-08 ed.).....	29
<u>5A Wash. Prac., Evidence Law and Practice § 602</u> (5th ed.)	48
<u>5C Wash. Prac., Evidence Law and Practice § 901</u> (5th ed.)	29, 30

Rules

CR 56	29
ER 901	30
RAP 2.5.....	44
RAP 10.3.....	4
RAP 12.1.....	5, 6
RAP 18.1.....	50

I. INTRODUCTION

It is unsurprising that the law does not support Mr. Cuzdey's lawsuit and that the trial court deemed it frivolous: All of Mr. Cuzdey's claims are based on an alleged 30-year-old oral agreement for the sale of real property that which Mr. Cuzdey waited over a decade—after the death of the person he allegedly had the oral agreement with—before bringing suit. Without even addressing the substance of his claims, they are barred by laches, the statute of frauds, the statute of limitations, and/or collateral estoppel.

Arguendo, if this Court examines the merits, Mr. Cuzdey has waived or abandoned appeal on all issues but quiet title. Moreover, Mrs. Landes' Second Amended Motion and Memorandum demonstrates, via properly authenticated documentary evidence, that Mr. Cuzdey's claims fail to meet requisite elements for any valid contract or relief based on his other claims.

Finally, the only evidence submitted by Mr. Cuzdey at summary judgment, in rebuttal, does not create material issues of law or fact: A declaration from him and one from his son, who was not even born at the time of the alleged oral contract. This is because Mrs. Landes did not waive the Deadman's Statute and because Mr. Cuzdey's son's contradictory declaration, recalling hearsay from when he was a child, failed to produce any admissible, reliable, or material evidence as to the elements of Mr. Cuzdey's claims.

II. RESTATEMENT OF THE ISSUES

This is a largely de novo review. As such, to help aid this Court in its review, Mrs. Landes addresses Mr. Cuzdey's assignment of errors by restating his issues on appeal. She also points out issues of waiver and alternative means, argued and acknowledged by the lower court,¹ to affirm the trial court's decision.

1. Whether Mr. Cuzdey waived challenge to the dismissal of all claims except for that of quiet title?
2. Whether the Doctrine of Laches bars Mr. Cuzdey's claims such that a discussion of substantive issues is unnecessary?
3. Whether the Statute of Frauds bars Mr. Cuzdey's claims such that a discussion of substantive issues is unnecessary?
4. Whether Applicable Statutes of Limitations bar Mr. Cuzdey's claims such that a discussion of substantive issues is unnecessary?
5. Whether the Doctrine of Collateral Estoppel bars Mr. Cuzdey's claim of quiet title to Mrs. Landes' real property?
6. If considering the merits, whether Mrs. Landes' Second Amended Motion and Memorandum for Summary Judgment demonstrated an absence of required evidence, as to the elements of Mr. Cuzdey's claims, requiring him to present sufficient evidence to rebut her contentions?
7. If considering the merits, whether Mr. Cuzdey's Declaration opposing Mrs. Landes' Second Amended Motion for Summary Judgment raises material issue(s) of law or fact?

¹ The trial court held that Mr. Cuzdey's entire action was barred by operation of the statute of frauds and operation of the Deadman's Statute; however, in the alternative it held the statute of limitations, laches, or estoppel barred the action as well. (RP 65-66). Each of these alternative bases for affirming the trial court's decision were properly argued and preserved below. Mrs. Landes argues these additional defense-issues on appeal.

8. If considering the merits, whether Mr. Cuzdey's son's Declaration opposing Ms. Landes' Second Amended Motion for Summary Judgment raises material issue(s) of law or fact?
9. Whether Mr. Cuzdey's Second Amended Complaint was frivolous such to support the trial court's award of attorneys' fees to Ms. Landes?

III. STANDARD OF REVIEW

In addition to Mr. Cuzdey's stated standard of review: Arguments not raised before the trial court are stricken or not considered on appeal. Kellar v. Estate of Kellar, 172 Wn.App. 562, 578-79, 291 P.3d 906 (2012). Evidentiary decisions, including those related to summary judgment, are reviewed for abuse of discretion. Eagle Group, Inc. v. Pullen, 114 Wn. App. 409, 416, 58 P.3d 292 (2002). "[A]n error will be considered not prejudicial and harmless unless it affects the outcome of the case." Havens v. C & D Plastics, Inc., 124 Wash. 2d 158, 169-70, 876 P.2d 435, 441 (1994). The trial court's judgment may be affirmed on any theory argued below. Carlson v. Gibraltar Sav. of Washington, F.A., 50 Wn. App. 424, 429, 749 P.2d 697, 700 (1988).

IV. ISSUE #1 RESTATED

Whether Mr. Cuzdey waived challenge to the dismissal of all claims except for that of quiet title?

//
//

4.1. Issue #1 Restatement of the Facts and Procedural History

On appeal, Mr. Cuzdey raises no assignment of errors in regard to quantum meruit, conversion, unjust enrichment, constructive trust, the denial of his motion for a continuance, or the authentication of documents contained within Mrs. Landes' Second Amended Memorandum in Support of Summary Judgment. Nor does Mr. Cuzdey argue or cite case law as to any of these claims in his Opening Brief.

4.2. Issue #1 Summary of the Argument

Mr. Cuzdey has not raised, argued, or challenged any error by the trial court in regard to his claims for quantum meruit, conversion, unjust enrichment, constructive trust, the denial of his motion for a continuance, or the authentication of documents. This failure constitutes waiver that cannot be corrected in a reply brief.

4.3. Issue #1 Argument

4.3.1. Mr. Cuzdey Has Waived and Abandoned Issues

“It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.” RAP 10.3(a)(4); RAP 10.3(a)(6); Emmerson v. Weilep, 126 Wash. App. 930, 939-40, 110 P.3d 214, 218 (2005); Cowiche Canyon Conservancy v. Bosley, 118 Wash. 2d 801, 809, 828 P.2d 549, 553 (1992);

Sacco v. Sacco, 114 Wash. 2d 1, 5, 784 P.2d 1266, 1268 (1990); Smith v. King, 106 Wash. 2d 443, 451, 722 P.2d 796, 801 (1986); Puget Sound Plywood, Inc. v. Mester, 86 Wash. 2d 135, 142, 542 P.2d 756, 761 (1975).

In Bosley, Smith, and Mester, the Supreme Court held, en banc, that the plaintiffs' assignments of error were waived or abandoned because they did not present adequate argument or cite case law. Bosley, 118 Wash. 2d at 809; Smith, 106 Wash. 2d at 451; Mester, 86 Wash. 2d at 142.

Here, Mr. Cuzdey did not argue or cite case law in regards to the claims of quantum meruit, conversion, unjust enrichment, constructive trust, the denial of his motion for a continuance, or the authentication of documentary evidence. Furthermore, he cannot cure this defect in his reply. See Bosley, 118 Wash. 2d at 809. Waiver has resulted, and the trial court's decision on these issues should be affirmed. See Bosley, 118 Wash. 2d at 809; Smith, 106 Wash. 2d at 451; Mester, 86 Wash. 2d at 142.

4.3.2. Mr. Cuzdey Has Not Adequately Briefed Issues

The Court may refuse to consider an argument when the Appellant does not provide "adequate briefing." Hiatt v. Walker Chevrolet Co., 120 Wash. 2d 57, 64, 837 P.2d 618, 622 (1992) (citing RAP 12.1(a)); State v. Mayes, 20 Wash.App. 184, 194, 579 P.2d 999, review denied, 91 Wash.2d 1001 (1978)). In Hiatt, the Supreme Court, en banc, "decline[d] to determine the

elements of a claim for religious discrimination in employment based on the law of this state” because the “issue was not adequately briefed.” Id.

Here, Mr. Cuzdey’s opening brief provides no argument on the claims of quantum meruit, conversion, unjust enrichment, constructive trust, the denial of his motion for a continuance, or the authentication of documentary evidence. Accordingly, the trial court’s decision on these matters should be affirmed. See RAP 12.1(a); Hiatt, 120 Wash. 2d at 64; Bosley, 118 Wash. 2d at 809.

V. ISSUE #2 RESTATED

Whether the Doctrine of Laches bars Mr. Cuzdey’s claims such that a discussion of substantive issues is unnecessary?

5.1. Issue #2 Restatement of the Case: Facts and Relevant Procedural History

Mr. Cuzdey was married to Mrs. Wallen (then Mrs. Cuzdey) on December 12, 1981. (CP 954 (Petition for Dissolution)). In May of 1983, the late Benny J. Landes, and Patricia Landes, husband and wife (“Mr. and/or Mrs. Landes”), purchased the real estate that Mr. Cuzdey desires quieted to him. (CP 423-27 (marriage license), CP 429 (Deed), CP 431-35 (Purchase and Sales Agreement), CP 437 (Title Insurance)). Beginning in 1984 and continuing through the years, Mr. and Mrs. Landes, at their expense, installed a well (CP 442 (Receipt Well Drilling), CP 444 (State Well Water Report)), septic system (CP 446-58 (Application for Septic System)), and

electrical service (CP 460-62 (Electrical Work Permit), CP 464 (Easement for Underground Electrical System), CP 467 (Receipt Electrical Work)) on their real property.

In 1985, Mr. and Mrs. Landes took out a loan with Seafirst Bank and purchased a Nova Commodore mobile home for Mrs. Wallen and her then husband, Mr. Cuzdey, to live in. (CP 469 (Vehicle Certification of Ownership), CP 471-74 (Financial Loan), CP 476 (Nova Commodore Installation Permit)). Under state law, this mobile home is a “vehicle” and personal property and taxes were paid as such. (CP 469, CP 489 (County Treasurer Receipts for Nova Personal Property Taxes)).

In 1996, Mr. and Mrs. Landes purchased for themselves a 1996 Goldenwest double wide manufactured home, by mortgaging the land, and they placed it on the property. (CP 503 (Check for Permit to Install Goldenwest Mobile Home), CP 505-06 (Deed of Conveyance), CP 508-11 (Letters from Chase Bank Regarding Assignment of Mortgage), CP 513-22 (Chase Mortgage Payment History)). In 1997, Mr. and Mrs. Landes eliminated Department of (vehicle) Licensing title to the Goldenwest and added it to their real property tax parcel. (CP 526 (Title Elimination Approval Letter), CP 528 (Certificate of Title Elimination)). Since their purchase of the real property in 1983, Mr. and Mrs. Landes have continually paid the real property taxes on the whole parcel (Assessor’s Tax Parcel

Number 12606220600) including on the Goldenwest since 1997. (CP 530-65 (Tax Records), CP 567-76 (Checks to County Assessor for Real Estate Taxes), CP 578 (County Assessor Value Change Notice)).

Since 1983, building permits for improvements on the property subject to this litigation have been taken out in Mr. and Mrs. Landes' name, as owners: In June of 1990, Mr. Landes applied for a permit to build a Shop/Barn/Utility Building.² (CP 586 (Permit Application for Shop/Barn/Utility Building)). The plan was reviewed by the Thurston County Public Works Department and references "Benny Landes." (CP 588-605 (Plan Review Checklist and Plans for Shop/Barn/Utility Building)). The foundation plan also references "Benny Landes." (CP 607-08 (Foundation Plan for Shop/Barn/Utility Building)). The Department of Public Works and Mr. Landes discussed approving this application in written correspondence. (CP 610 (Letter from Department of Public Works Permit Application of Shop/Barn/Utility Building)). The Thurston County Public Works Department granted Mr. Landes the permit. (CP 612 (Permit for Shop/Barn/Utility Building)). Mr. Landes received a receipt for the permit fee (CP 614 (Receipt for Shop/Barn/Utility Building Permit))

² The structure built in 1990 is referred to as the "shop" today; however, in 1990 Mr. and Mrs. Landes had not yet built a "barn" and Mr. Landes' permits, paperwork, and schematics for this building—in 1990—refer to this structure as a "barn" or "utility building."

because Mr. and Mrs. Landes paid for the permit. (CP 616 (Check for Shop/Barn/Utility Building Permit)). Mr. and Mrs. Landes purchased the Shop/Barn/Utility Building materials from Rochester Lumber as well as other retailers. (CP 618 (Check to Rochester Lumber), CP 660-840 (Receipts by Year)). Mr. and Mrs. Landes also applied for, received, and paid for the permit to run electricity to the structure. (CP 620 (Check for Electrical Permit)). Subsequently, in 1994, Mr. Landes applied for a permit to install a 200 amp breaker in the Shop/Barn/Utility Building. (CP 622 (Electrical Work Application for Shop/Barn/Utility Building)). “The Repair Shop” by Mr. Landes and Mr. Cuzdey was a business set up on the property. (CP 624 (Business Card)).

In 1993, Mr. and Mrs. Landes executed a community property agreement. (CP 914-18). In July of 1996, Mr. Landes applied for a permit to build a barn to shelter animals and he is listed throughout the permit application as the owner. (CP 626 (Permit Application for Animal Shelter/Barn)). The permit was approved. (CP 628-31 (Permit for Animal Shelter/Barn)). Mr. and Mrs. Landes paid for the permit. (CP 633 (Check for Animal Shelter/Barn Permit)).

In August of 1996, Mr. Landes applied for the permit that allowed him to place his Goldenwest mobile home on the property. (CP 635 (Permit Application for Placement of Goldenwest)). That permit was approved. (CP

637-41 (Permit for Placement of Goldenwest signed by Mrs. Landes)). Mr. Landes paid for the accompanying electrical permit. (CP 643 (Check for Electrical Permit)).

In March of 1997, Mr. Landes worked with Puget Power Company to move a barn built for Mrs. Landes as it infringed on Puget Power Company's easement. (CP 645 (Letter from Puget Power Company)).

In November of 1997, Mr. Landes applied for a foundation permit to move Mrs. Landes' barn off of Puget Power Company's easement. (CP 647 (Permit Application for Foundation of Agricultural Building), CP 649-53 (Foundation Permit)). Notably, Mrs. Landes wrote a check to then "Karla Cuzdey" (Now Defendant Karla Wallen) for \$1,000.00 for her help moving the barn. (CP 655 (Check to Karla Cuzdey for Moving Barn)).

In 1997, Mr. and Mrs. Landes borrowed money to install a gas stove, pipe, and tank. (CP 657-58 (Retail Installment Contract and Security Agreement)). For 32+ years Mr. and Mrs. Landes kept hundreds of receipts and other records, evidencing their payments for the many improvements to the property, most of which occurred in the years prior to 1998. (CP 660-840 (Year by Year Receipts and Records 1990-1998)). Mr. and Mrs. Landes wrote a lifetime of checks paying for improvements and maintenance of their home and the real property. (CP 842-908 (Checks by Mr. and Mrs.

Landes)). In 1998, Mrs. Landes paid for a fence to surround their Goldenwest to contain pets. (CP 910 (Check for Fence)).

Mr. Landes died in 2001. (CP 912 (Death Certificate of Mr. Landes)). Patricia Landes inherited her husband's interest in the subject real property pursuant to a Community Property Agreement (CP 914-18) that was recorded with the county in 2002. (CP 914-18). Mrs. Landes continues to live on her property and continues to exercise all rights of a property owner, including payment of property taxes at a senior discount. (CP 920-21 (Thurston County Assessor Records Indicating Senior Discount)). At the end of 2001, Mrs. Landes refinanced the real property and recorded a deed of trust. (CP 923-46 (Deed of Trust)). Title insurance was obtained on December 24, 2001. (CP 948 (Letter re: title insurance)). Over the years since Mr. Landes' passing, Mrs. Landes repeatedly applied for and received tax assistance as a part of the Property Tax Assistance Program for Widows of Veterans. (CP 950-52 (Department of Revenue Approval Letters)).

Thirteen plus years passed since Mr. Landes died without Mr. Cuzdey filing any suit against Mrs. Landes.

In January 2014, Mr. Cuzdey joined and signed a Petition for Dissolution of Marriage in Lincoln County Superior Court. (CP 954-57). Section 1.8 titled "Property" demonstrates that the parties owned only personal property, and no real property. (CP 955-56). In May of 2014, Mr.

Cuzdey signed a corresponding Decree of Dissolution that stated he owned no real property. (CP 959-61).

Mr. Cuzdey filed suit in July of 2014 claiming an oral agreement between him and the Landes from 1984, after Mrs. Landes asked him to leave her property and had to file an unlawful detainer action in an attempt to make him do so.

5.2. Issue #2 Summary of the Argument

Under Carlson and the doctrine of laches, this Court has every reason to affirm the trial court's dismissal of Mr. Cuzdey's claims. Mr. Cuzdey had reasonable opportunity to discover and bring his potential claims for many years, and it was unreasonable for him to ask the trial court for relief based on an alleged 30-year-old oral agreement. This is especially true since the person that he allegedly agreed with cannot defend himself as he had been dead for 13 years, and since Mr. Cuzdey, essentially, wished to re-litigate his dissolution.

5.3. Issue #2 Argument

"Laches is an implied waiver arising from knowledge of a given state of affairs and acquiescence in it." Carlson, 50 Wash. App. at 429. The elements of laches are as follows:

- (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant;
- (2) an unreasonable delay by the

plaintiff in commencing that cause of action [and]; (3) damage to [the] defendant resulting from the unreasonable delay.

Id. Importantly, “[W]here laches bars an action, logic and judicial economy dictate that the court avoid the substantive issues altogether.” Id.

In Carlson, laches barred the potential cause of action by the plaintiff because the plaintiff waited just over three years to bring suit. Id. at 430. Notably, plaintiff’s claim that he waited to bring suit because he assumed his rights were being protected during that three-year time frame by the assurances of others was held “meritless.” Id. at 431. Furthermore, the court found it even “less reasonable” for plaintiff to attempt to “reinstate litigation of the very matters previously settled.” Id. at 431-32. In short, the court held plaintiff’s three year “delay” was “manifestly unreasonable.” Id. at 432.

Here, Mr. Cuzdey’s delay in “discover[ing]” and “commenc[ing]” his “potential” claims exceeds 30 years. That delay is far more “manifestly unreasonable” than the plaintiff’s “delay” in Carlson. More to the point, the delay is 13 years after the person he allegedly agreed with died. Mrs. Landes is harmed by Mr. Cuzdey attempting to take her home and property without Mr. Landes alive to rebut Mr. Cuzdey’s false, and beyond stale, claims. She is also harmed by the loss of monies, taxes, and improvements she has made to the property if the property is taken from her now. Moreover, Mr. Cuzdey’s argument of relying on assurances from others cannot defeat Mrs.

Landes' laches defense. See Carlson, 50 Wash. App. at 431. Nor should he be able to re-litigate his dissolution decree in this action. See id. at 431-32. Consequently, under Carlson, the elements of laches weigh totally in Mrs. Landes' favor, and "judicial economy" dictates the Court affirm on this basis. See id. at 429-31.

VI. ISSUE #3 RESTATED

Whether the Statute of Frauds bars Mr. Cuzdey's claims such that a discussion of substantive issues is unnecessary?

6.1. Issue #3 Relevant Facts and Procedural History

See Section 5.1, infra. In addition, no written agreement, contract, or any documentary evidence was ever filed with the trial court by Mr. Cuzdey. He did allege, however, that the alleged oral contract "would allow Mr. and Mrs. Landes to live on the property with [his] permission . . . in exchange for the care of Mr. and Mrs. Landes into their old age until they passed away or could no longer live on the property." (CP 163).

6.2. Issue #3 Summary of the Argument

The statute of frauds bars Mr. Cuzdey's suit because there is no written contract supporting any of his claims. Moreover, (alleged) partial performance cannot save his action. Finally, his suit is barred because the alleged contract could not be performed within one year.

//

6.3. Issue #3 Argument

The statute of frauds is not a doctrine in equity, it is a positive statutory mandate which renders void and unenforceable those undertakings which offend it. Trethewey v. Bancroft-Whitney Co., 13 Wash. App. 353, 360, 534 P.2d 1382, 1386 (1975).

6.3.1. *No Part Performance*

“Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed. . . .” RCW 64.04.010. “An agreement to convey real estate must be in writing.” Georges v. Loutsis, 20 Wash.2d 92, 145 P.2d 901 (1944). An oral contract for the purchase of land is unenforceable. Pitman v. Smith, 158 Wash. 467, 291 P. 334 (1930). Part performance of a contract for the sale of real property may remove a contract from the statute of frauds if a party is able to show: (1) delivery and assumption of exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial, and valuable improvements, referable to the contract. Pardee v. Jolly, 163 Wash.2d 558, 182 P.3d 967 (2008). The word “possession” is defined as “control or occupancy without regard to ownership.” (CP 984); see also RCW 82.29A.020(1) (using the terms occupancy and possession interchangeably).

Here, Mrs. Landes has valid title to her property. (CP 429). Part performance is inapplicable because Mr. and Mrs. Landes have always had possession of their property, and Mr. Cuzdey has never had exclusive possession of the real property. (See e.g., CP 981-993). Second, Mr. Cuzdey's claim of paying real estate taxes on the property is false. (CP 567-76). Third, Mr. Cuzdey's claims of making, permitting, or paying for substantial improvements such as the well and septic system are also false. (CP 442-58).

6.3.2. Contract Longer Than One Year

In Trethewey, the court held part performance is not an exception to the statute of frauds when a contract cannot be performed within a year:

The rule may be generally stated that the part performance of services under an oral contract not to be performed within a year does not remove the contract from the operation of the statute of frauds, with the result that an action may not be maintained for the breach of the entire contract.

Trethewey, 13 Wash. App. at 359. Here, it is plain that Mr. Cuzdey's alleged oral contract to perform labor, clear trees, move mobile homes, install a well and septic, "over time," and to care for the Landes' in their elderly age, could not be performed within one year; thus, his action "may not be maintained." See id.

//

//

VII. ISSUE #4 RESTATED

Whether Applicable Statutes of Limitations bar Mr. Cuzdey's claims such that a discussion of substantive issues is unnecessary?

7.1. Issue #4 Relevant Facts and Procedural History

See Section 5.1, infra.

7.2. Issue #4 Summary of the Argument

Quiet title actions may be filed at any time. However, the underlying claims, e.g., breach of contract, are subject to applicable statute of limitation periods. Mr. Cuzdey's claims accrued after he allegedly fulfilled the terms of the alleged oral contract "long ago," and those claims are now time barred. Alternatively, these claims accrued when Mr. Landes passed in 2001, or in 2002 when Mrs. Landes recorded her community property agreement. Mr. Cuzdey's claim that the alleged original oral contract was modified after Mr. Landes' death is unsupported by consideration and unenforceable. Moreover, the gravamen of his complaint is that Mr. and Mrs. Landes made misrepresentations and defrauded him; these claims are time barred. Finally, Mr. Cuzdey's other claims are also time barred.

7.3. Issue #4 Argument

A statute of limitation is designed to protect individuals and courts from stale claims. Kelly v. Allianz Life Ins. Co. of N. Am., 178 Wash. App. 395, 399, 314 P.3d 755, 757 (2013). Where the statute of limitation bars an

action—courts are powerless to allow an action to proceed—even if a party admits fault. See Pearl v. City of Long Beach, 296 F.3d 76, 89 (2d Cir. 2002) (holding “the statute of limitations remains an insuperable obstacle” to even legitimate claims because courts “are obliged to uphold the policies animating the applicable statute of limitations”; even if the “result seems harsh” there is “no basis in . . . law to make an exception to accommodate [even just claims, which are barred].” This is because “[t]o reopen all such claims might compensate a few deserving plaintiffs, but it would also put at risk many blameless defendants who could not fairly defend after expiration of the interval the state legislature has determined is appropriate.”).

7.3.1. Quiet Title and Statute of Limitations

“An action to quiet title allows a person in peaceable possession or claiming the right to possession of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination.” Kobza v. Tripp, 105 Wash. App. 90, 95, 18 P.3d 621, 623-24 (2001). Parties may assert even “absolutely invalid” quiet title actions at any time, but the underlying claims, e.g., breach of contract, that provide the basis to grant quiet title relief have applicable statute of limitation periods. See Kobza, 105 Wash. App. at 95; Walcker v. Benson & McLaughlin, P.S., 79 Wash. App. 739, 743, 904 P.2d 1176, 1178 (1995) (holding “a statute of limitation does not *invalidate* a

claim, but rather deprives a plaintiff of the opportunity to invoke the power of the courts in support of an otherwise valid claim”) (emphasis in original); Turpen v. Johnson, 26 Wash. 2d 716, 732, 175 P.2d 495, 504 (1946) (barring quiet title claim because “[t]he controlling element in the entire case was the application of the statute of limitations.”).³

Here, Mr. Cuzdey’s argument that there is no statute of limitation on quiet title claims is too clever by half: Anyone may bring a quiet title action, at any time, but Mr. Cuzdey’s specific claims, e.g., breach of oral agreement, which form the legal basis of his quiet title action, are time barred.⁴ See In re Relationship of Eggers, 30 Wash. App. 867, 638 P.2d 1267 (Div. 3 1982) (holding three year statute of limitations on actions based on express oral contracts); Culligan v. Old Nat. Bank of Wash., 1 Wash. App. 892, 465 P.2d 190 (Div. 3 1970) (holding three year statute of limitations on actions based on implied contracts for services rendered); Nilson v. Castle Rock School Dist., 88 Wash. App. 627, 945 P.2d 765 (Div.

³ The (practical/necessary) reasons animating the policy for no statute of limitation period for quiet title actions for land, e.g., the permanent nature of real estate and need for clear ownership of title, likely do not apply to actions praying to quiet title in personal property, which is rarely everlasting and for which conversion is the more appropriate action. Undersigned counsel can find no case for quieting title to personal property in which a court proclaims there is not a statute of limitations period.

⁴ Mr. Cuzdey relies on Petersen v. Schafer, 42 Wash. App. 281, 284, 709 P.2d 813, 815 (1985) to assert the statute of limitations does not apply to his claims. Petersen is in accord with Mrs. Landes’ statute of limitation and quiet title argument, and is inapplicable to the case at hand; Mr. Cuzdey or Mrs. Landes, just like anyone else, could bring a quiet title action at any time, but Mr. Cuzdey’s legal basis, e.g., breach of contract, for quiet title relief is frivolous and time barred.

2 1997) (holding three year statute of limitations on actions based on oral loan agreements); In re Kelly and Moesslang, 170 Wash. App. 722, 287 P.3d 12 (Div. 3 2012), review denied, 176 Wash. 2d 1018, 297 P.3d 706 (2013) (holding three year statute of limitations on actions based on suits to establish and divide property); Eckert v. Skagit Corp., 20 Wash. App. 849, 583 P.2d 1239 (Div. 1 1978) (holding three year statute of limitations on actions for actions based on quasi-contracts and unjust enrichment).

Put another way, Mrs. Landes *could have brought a quiet title/ejectment action against Mr. Cuzdey* “for the purpose of stopping the mouth of a person who has asserted or who is asserting a claim to [her] property.” See Kobza, 105 Wash. App. at 95. And she would have won based on the statute of limitations because Mr. Cuzdey’s defense, e.g., his alleged oral agreement, would have failed as time barred. See e.g., Walcker, 79 Wash. App. at 743 (holding statute of limitation barred defendant from enforcing “underlying promissory note” so that plaintiff was entitled to quiet title relief); Cushing v. City of Spokane, 45 Wash. 193, 195, 87 P. 1121, 1122 (1906) (holding defendant’s defense to plaintiff’s quiet title action based on lien and the right to enforce the lien was barred by the statute of limitations).

7.3.2. *Accrual and Alleged New Promises*

A statutory period begins to run when the plaintiff’s claim accrues. Allianz Life Ins. Co. of N. Am., 178 Wash. App. at 399. Claims accrue

when the party has the right to apply to a court for relief. Id. Accrual of contract claims occurs on breach. Id. The discovery rule generally does not apply to an action for breach of contract. Id. “[M]odification to an existing contract must be supported by consideration independent from that which was given in order to form the original contract.” Lokan & Associates, Inc. v. Am. Beef Processing, LLC, 177 Wash. App. 490, 496, 311 P.3d 1285, 1288 (2013).

Community property agreements “enable husbands and wives to enter into community property agreements concerning the status and disposition of their property to take effect upon the death of either.” In re Wittman's Estate, 58 Wash. 2d 841, 843-44, 365 P.2d 17, 19 (1961). Such agreements “are completely executed when one of the parties to the recorded contract dies.” Id. “Title to the community property, thereupon, vests as the sole and separate property of the survivor.” Id. “Unless such a recorded contract is rescinded by the parties, it constitutes a conveyance by the decedent to a surviving spouse.” Id. “When an instrument involving real property is properly recorded, it becomes notice to all the world of its contents.” Strong v. Clark, 56 Wn.2d 230, 332, 352 P.2d 183 (Wash. 1960).

Claims for misrepresentation accrue at the time the aggrieved party has a right to bring suit. Shepard v. Holmes, 185 Wash. App. 730, 742, 345 P.3d 786, 791 (2014). “The statute [of limitation] begins to run in fraud cases

when there is discovery by the aggrieved party of the facts constituting the fraud.” Strong, 56 Wn.2d at 332. “Actual knowledge of the fraud will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered it.” Id. “When the facts upon which the fraud is predicated are contained in a written instrument which is placed on the public record, there is constructive notice of its contents, and the statute of limitations begins to run at the date of the recording of the instrument.” Id.

Here, all of Mr. Cuzdey’s claims stem from an alleged 30-year-old oral agreement for the sale of property that which Mr. Cuzdey then waited over a decade—after the death of the person he allegedly had the oral agreement with—before bringing suit. The gravamen of his suit is that the Landes’ misrepresented to him, and committed fraud, by “ask[ing] permission to retain paper title a little longer” and by never transferring title to him. (Opening Brief at 21).

Accordingly, Mr. Cuzdey’s claims accrued the moment he fulfilled his end of the alleged bargain “long ago,” and title was not transferred. See Allianz Life Ins. Co. of N. Am., 178 Wash. App. at 399; Shepard, 185 Wash. App. at 742; Strong, 56 Wn.2d at 332; (CP 164). Alternatively, they accrued when Mr. Cuzdey was put on actual notice of title legally transferring to Mrs. Landes when Mr. Landes died. See In re Wittman's Estate, 58 Wash. 2d at 843-44. At the very latest, they accrued when Mrs. Landes put Mr.

Cuzdey on “inferred” actual notice of fraud, or constructive notice of her repudiation of his claims, by recording her community property agreement, executed in 1993, with the county in 2002. See In re Wittman's Estate, 58 Wash. 2d at 843-44; Strong, 56 Wn.2d at 332.

Mr. Cuzdey’s attempt to defeat the statute of limitations by claiming “Landes asked permission to retain paper title a little longer” is unsupported by either law or fact. First, Mrs. Landes’ recording of the community property agreement in 2002, after Mr. Landes died, “constitute[d] a conveyance by [Mr. Landes] to [his] surviving spouse[.]” and was notice “to all the world,” repudiating Mr. Cuzdey’s claim of Mrs. Landes’ alleged “promise” to wait a “little longer.”⁵ See In re Wittman's Estate, 58 Wash. 2d at 843-44; (CP 914-18). Second, any alleged modification of the alleged original oral contract is unsupported by independent consideration and unenforceable. See Lokan & Associates, Inc., 177 Wash. App. at 496. Finally, the assertion that Mrs. Landes misled Mr. Cuzdey after Mr. Landes’ death, i.e., fraud, is also time barred. See Shepard, 185 Wash. App. at 742.

//

//

⁵ As any estate planning attorney would concede, community property agreements are recommended to avoid (the cost of the first) probate upon the death of the first spouse when a couple owns real property. Couples without real property can avoid probate via joint right of survivorship/payable on death provisions on financial accounts and personal property affidavits (RCW 11.62.010).

7.3.3. *Quantum Meruit, Unjust Enrichment, Conversion, and Constructive Trust*

Mr. Cuzdey's claims for quantum meruit, unjust enrichment, conversion, and constructive trust are barred for the same reasons. See RCW 4.16.080(2); RCW 11.96.060(1); Goodman v. Goodman, 128 Wash. 2d 366, 907 P.2d 290 (1995) (holding three year statute of limitations on actions based on express or constructive trusts); Arneman v. Arneman, 43 Wash. 2d 787, 264 P.2d 256, 45 A.L.R.2d 370 (1953); Hart v. Clark County, 52 Wash. App. 113, 758 P.2d 515 (Div. 2 1988) (holding three year statute of limitations on actions for actions based on money wrongfully received or withheld); Davenport v. Washington Educ. Ass'n, 147 Wash. App. 704, 197 P.3d 686 (Div. 2 2008) (holding three year statute of limitations on actions based on unjust enrichment).

VIII. ISSUE #5 RESTATED

Whether the Doctrine of Collateral Estoppel bars Mr. Cuzdey's claim of quiet title to Mrs. Landes' real property?

8.1. Issue #5 Relevant Facts and Procedural History

See Section 5.1, infra.

8.2. Issue #5 Summary of the Argument

Mr. Cuzdey's action is barred by the doctrine of collateral estoppel because he signed a final dissolution decree prior to this suit stating he owned no real property.

8.3. Issue #5 Argument

“Collateral estoppel” is an affirmative defense barring a party from re-litigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one. Christensen v. Grant County Hospital Dist. No. 1, 152 Wn.2d 299, 96 P.3d 957 (2004). The party asserting the doctrine shows: (1) an identical issue in a prior and a subsequent action; (2) the prior adjudication ended in a final judgment on the merits; (3) privity; and (4) application of the doctrine does not work an injustice. Chau v. City of Seattle, 60 Wash.App. 115, 119, 802 P.2d 822 (1991).

Here, in January of 2014, Mr. Cuzdey joined and signed a Petition for Dissolution of Marriage. (CP 954-57). Section 1.8 titled “Property” demonstrates that the parties owned no real property. (CP 955). In May of 2014, Mr. Cuzdey signed a Decree of Dissolution. (CP 959-961). Section 1.1 “Real Property Judgment Summary” also demonstrates that the parties owned no real property. (CP 959).

Consequently, estoppel bars this action: First, the issue regarding ownership of real property in the dissolution action is the same as in this action. Second, the Decree of Dissolution was a final judgment on the merits. Third, Mr. Cuzdey was a party in the dissolution action and privity is established. Fourth, application of the doctrine will not be an injustice as

Mr. Cuzdey will be in the same position he has been in for 30+ years; he will continue to have no ownership interest in the real property subject to this litigation. Non-application of the doctrine, on the other hand, will work a huge injustice on Mrs. Landes because she could lose her home and property, and investments in such, after 30+ years of performing all actions of a true owner.

IX. ISSUE #6 RESTATED

If considering the merits, whether Mrs. Landes' Second Amended Motion and Memorandum for Summary Judgment demonstrated an absence of required evidence, as to the elements of Mr. Cuzdey's claims, requiring him to present sufficient evidence to rebut her contentions?

9.1. Issue #6 Relevant Facts and Procedural History

In April of 2015, Mr Cuzdey moved for a CR 56 continuance as well as a continuance of the trial date. (CP 1022-28). Mrs. Landes attached documentary evidence to her response in opposition to Mr. Cuzdey's motions for continuances. (CP 1043-1115). Mr. Cuzdey made no objection as to the admission or authentication of that evidence, in any filing or on the record. (CP 1116-22). The trial court signed denied Mr. Cuzdey's motion for a trial date continuance, and granted Mr. Cuzdey's motion for a CR 56 continuance. (CP 1123-24). The new summary judgment hearing date was set for June 19, 2015. (CP 173).

On the last day of April 2015, Mr. Cuzdey moved for leave to file a

Second Amended Complaint. (CP 1125-32). In her opposition, Mrs. Landes attached documentary evidence to her response in opposition. (CP 1156-1203). Mr. Cuzdey did not object to authentication nor admissibility in his reply. (CP 1204-11). In May 2015, the parties entered an agreed order that expressly stated that Mr. Cuzdey could file his Second Amended Complaint on condition that Mrs. Landes could file a Second Amended Motion and Memorandum for Summary Judgment. (CP 172-74). The order expressly stated the summary judgment hearing would be on June 19, 2015. (CP 173).

Thereafter, Mr. Cuzdey filed his Second Amended Complaint, and Mrs. Landes timely filed her Second Amended Motion and Memorandum for Summary Judgment. (CP 397). The Second Amended Motion added additional defenses. (CP 175-76). The Second Amended Memorandum included documentary evidence previously filed from April court appearances. The previously filed documentary evidence consisted of some of the same documentary evidence attached to Mrs. Landes' Second Amended Memorandum. Mr. Cuzdey responded to Mrs. Landes' Second Amended Motion "seeking a CR 56(f) continuance; or, in the alternative striking appropriate exhibits (attachments) [from the Memorandum in support of]." (CP 222-23).

Mr. Cuzdey's motion for a second CR 56 continuance did not cite a single witness or piece of evidence that he would obtain if another CR 56

continuance was granted again. (CP 208-32). Mrs. Landes replied in opposition to another CR 56 continuance. (CP 233-42). Mrs. Landes also filed declarations authenticating the attachments to her Second Amended Memorandum. One from her. (CP 1004-1013). And one from her attorney. (CP 994-1003).

9.2. Issue #6 Summary of the Argument

The documentary evidence attached to Mrs. Landes' Second Amended Memorandum was sufficiently authenticated via declarations timely filed by Mrs. Landes. Moreover, Mr. Cuzdey waived objection to many of the documents by not timely objecting when they were filed and argued at prior court hearings. Finally, Mrs. Landes demonstrated that Mr. Cuzdey's claims were not supported in evidence, requiring him to produce sufficient rebuttal evidence.

9.3. Issue #6 Argument

Under CR 56, the moving party may show the absence of evidence supporting the nonmoving party's case and that no genuine dispute exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Young v. Key Pharmaceuticals, Inc., 112 Wash.2d 216, 225-26, 770 P.2d 182 (1989).

//

//

9.3.1. Authentication of Documentary Evidence

After a summary judgment motion is filed, “[i]t is a party’s right” to “file affidavits to assist the [trial] court in determining the existence of an issue of material fact.” See Cofer v. Pierce Cnty., 8 Wash. App. 258, 261, 505 P.2d 476, 478 (1973). A party’s “right” to do so extends even “after argument is heard” on the motion, “until a formal order granting or denying the motion for summary judgment is entered.” See id.

“Rule 901 lists ten acceptable methods of authentication . . . [but] the rule does not preclude the use of other methods of authentication . . . [such as] admission by the opposing party.” Courtroom Handbook on Washington Evidence, Chapter 5, pg. 461, Karl B. Tegland (2007-08 ed.). “In the absence of timely objection, challenges to the sufficiency of the foundation requirements will normally be waived.” State v. Roberts, 73 Wn.App 141, 867 P.2d 697 (1994). Notarized documents are also generally deemed authentic. See State v. Scriver, 20 Wash. App. 388, 398, 580 P.2d 265 (Div. 1 1978) (holding document was authenticated where notary’s testimony in regards to the same was “far from certain”).

Furthermore, as a general rule, “the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” 5C Wash. Prac., Evidence Law and Practice § 901.2

(5th ed.) (citing ER 901(a)). The proponent of the evidence need only make a prima facie showing of authenticity, such that a reasonable juror would favor authenticity or identification. State v. Williams, 136 Wash. App. 486, 500, 150 P.3d 111, 118 (2007); 5C Wash. Prac., Evidence Law and Practice § 901.2 (5th ed.). Notably, “when a witness is authenticating a document, the rule does not require that the witness have personal, first-hand knowledge of the facts stated in the document. The rule requires only that the witness have sufficient personal knowledge to testify as required by Rule 901—that the document is what it purports to be.” 5C Wash. Prac., Evidence Law and Practice § 901.6, Karl B. Tegland, (5th ed.).

A trial court is not bound by the rules of evidence, and may rely upon lay opinions, hearsay, or the proffered evidence itself in making its determination as to authenticity. Williams, 136 Wash. App. at 500. Contrary evidence is disregarded for purposes of determining authenticity. 5C Wash. Prac., Evidence Law and Practice § 901.2 (5th ed.).

Finally, authenticity may be established by “appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” 5C Wash. Prac., Evidence Law and Practice § 901.9, Karl B. Tegland, (5th ed.) (citing United States v. Gordon, 634 F.2d 639, 643-44 (1st Cir. 1980) (holding documents refer to the same or similar transactions and the parties referenced these same transactions in

testimony); U.S. v. Bello-Perez, 977 F.2d 664 (1st Cir. 1992) (letter was sufficiently authenticated because of circumstantial evidence)).

Here, Mrs. Landes timely submitted and authenticated the documentary evidence via declarations from herself and her attorney. See above cited authority; (CP 994-1013). Second, Mr. Cuzdey waived objection as to foundation and authenticity to many of these documents by not objecting when the documents were previously filed with the Court. See Roberts, 73 Wn.App 141; (CP 1043-1115, 1156-1203). Last, many of the documents are notarized and authentic. See Scriver, 20 Wash. App. at 398.

9.3.2. Mrs. Landes Demonstrated a Lack of Required Evidence, as to Mr. Cuzdey's Claims, Requiring Him to Present Sufficient Evidence to Rebut Her Contentions

The documentary evidence provided by Mrs. Landes demonstrates Mr. Cuzdey's claims could not stand, placing the burden on him to present sufficient rebuttal evidence:

9.3.2.1. No Oral Contract

The burden of proving the existence of a contract is on the party asserting its existence and requires proof of each essential element. Becker v. Washington State University, 165 Wash. App. 235, 266 P.3d 893 (Div. 3 2011), review denied, 173 Wash. 2d 1033, 277 P.3d 668 (2012).⁶ “For a

⁶ See also Trotzer v. Vig, 149 Wash. App. 594, 203 P.3d 1056 (Div. 2 2009) (holding settlement agreement was not supported by consideration and therefore did not become binding contract); Sickawitch v. Washington Beef Producers, Inc., 58 Wash. App. 454, 793

contract to exist, there must be a mutual intention or ‘meeting of the minds’ on the essential terms of the agreement.” Saluteen-Maschersky v. Countrywide Funding Corp., 105 Wash. App. 846, 22 P.3d 804 (Div. 1 2001). “Washington follows the objective manifestation test for contracts, the parties must objectively manifest their mutual assent and the terms assented to must be sufficiently definite.” Becker, 165 Wash. App. at 246. The essential elements of any contract are (1) subject matter, (2) the parties, (3) the promise, (4) the terms and conditions, and (5) consideration. Halbert v. Forney, 88 Wash. App. 669, 945 P.2d 1137 (Div. 1 1997).

In Halbert v. Forney, a contract for the purchase of real estate was held unenforceable when the “agreement . . . lacked numerous material terms”:

The agreement makes no provision for declaring forfeiture, fails to specify the type of deed to be supplied, makes no allocation of risk of damage or destruction, requires interest but fails to specify any payment terms, and makes no provision regarding utilities, taxes, repairs, capital improvements, or indemnification. In short, the agreement fails to satisfy the requirements for formation of a contract for the sale of land. What the Supreme Court reiterated in Sea-Van is apropos here: Negotiation, not litigation, is the proper method to agree upon these vital terms.

Id. at 676-77 (internal punctuation and citation omitted). The court further noted, that a vague contract—even if written—is unenforceable if ambiguous. Id. at 676. Ambiguity is created if the contract “seemingly

P.2d 994 (Div. 3 1990) (employee did not establish that a contract of employment for a specific time period was entered into).

anticipates a second contract that would necessarily include numerous terms to which the parties never agreed [in the first contract].” Id. This is because “[c]ontemplation of such a second contract is enough to render [an] . . . agreement [for the purchase of real property] unenforceable.” Id.

Here, Mrs. Landes’ documentary evidence “objectively” demonstrates that there never was any mutual assent, consideration, or requisite terms agreed between the Landes’ and Mr. Cuzdey for either the real estate or the Nova manufactured home. See Becker, 165 Wash. App. 235; Countrywide Funding Corp., 105 Wash. App. 846; Sea-Van Investments Associates v. Hamilton, 125 Wn.2d 120, 127, 881 P.2d 1035, 1039 (1994); Halbert, 88 Wash. App. at 676-77; (CP 429, 469 (Deeds); CP 567-76 (taxes paid); CP 476, 612, 628-31, 635, 637-41, 649-53 (permits obtained); CP 660-840 (receipts); CP 471-74, 478, 483, 505-22 (mortgages obtained); CP 503, 616-20, 633, 643, 655, 657-58, 842-910 (checks paid); CP 914-18 (community property agreement); CP 655 (moving of Goldenwest mobile home); CP 583-84 (value of the real estate); CP 920-21, 950-52 (senior and widow discounts on the real estate); CP 528 (title elimination on the Goldenwest); CP 954-61 (Cuzdey Petition and Dissolution Decree).

Moreover, Mr. Cuzdey’s Second Amended Complaint alleges an agreement lacking material terms, or left to be contemplated in the future;

thus, it's ambiguous and unenforceable. See Halbert, 88 Wash. App. at 676-77.

9.3.2.2. No Exclusivity and No Hostility

“In order to establish a claim of adverse possession, there must be possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile under a claim of right made in good faith. Anderson v. Hudak, 80 Wn.App. 398, 401 (1985) (emphasis added); Doyle v. Hicks, 78 Wn.App. 538, 542, 897 P.2d 420 (1995). Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of 10 years. RCW 4.16.020; ITT Rayonier, Inc. V. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). The exclusive element must be of a type that would be expected of an owner. ITT Rayonier, 112 Wn.2d at 757. An adverse possession claim fails if the claimant used the property with the true owners' permission as hostility is not met. Riley v. Andres, 107 Wn.App. 391, 27 P.3d 618 (2001).

Here, the documentary evidence demonstrates that Mr. Cuzdey cannot meet the required elements of exclusivity and hostility. This is because the Landes' occupied, controlled, and/or possessed the real property subject to this litigation, and because Mr. Cuzdey admits this fact. (CP 954-61, 981-93). Moreover, Mr. Cuzdey being on the property was and always has been by permission because he was the Landes' daughter's husband. (CP 954-

61). Consequently, the documentary evidence demonstrates that any claim by Mr. Cuzdey for adverse possession fails.

9.3.2.3. *Quantum Meruit*

Quantum meruit is an agreement depending for its existence on some act or conduct of the party sought to be charged and arising by implication from circumstances which, according to common understanding, show a mutual intention on the part of the parties to contract with each other. The services must be rendered under such circumstances as to indicate that the person rendering them expected to be paid therefor, and that the recipient expected, or should have expected, to pay for them.

[T]he elements of a contract implied in fact are (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work.

Granville Condo. Homeowners Ass'n v. Kuehner, 177 Wn. App. 543, 554-55, 312 P.3d 702, 709 (2013) (holding the theory did not apply because there was no showing of a mutual intention on the part of the parties to contract with each other). Additionally, it is generally presumed that support and services rendered between family members are gratuitous in the absence of a contract, express or implied, to pay. Johnston v. Johnston, 182 Wash. 573, 575, 47 P.2d 1048, 1049 (1935) (requiring presumption be overcome by clear and convincing evidence showing an intention that they were to be paid for in pecuniary recompense).

Here, the documentary evidence demonstrates an utter lack of any mutual intent between the Landes' and Mr. Cuzdey to do any work in exchange for property. In fact, when Mrs. Wallen did work—the Landes' paid her. (CP 655). Thus, the documentary evidence demonstrates both the lack of any implied contract, and the fact that Mr. Cuzdey cannot overcome the presumption that any services were anything but gratuitous.

9.3.2.4. Constructive Trust

Washington adopts Judge Cardoza's definition of a constructive trust:

A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

Pitzer v. Union Bank of California, 141 Wash. 2d 539, 548-49, 9 P.3d 805, 809 (2000). "Constructive trusts arising in equity are imposed when there is clear, cogent, and convincing evidence of the *basis* for impressing the trust." Id. (emphasis in original). In Pitzer, the Supreme Court, en banc, affirmed the trial court's granting of summary judgment—finding that no material issue of law or fact nor principals of equity established a constructive trust. Id. at 549, 557. The court rejected plaintiff's argument that "unjust enrichment" at the expense of the plaintiff was enough to establish a constructive trust. Id. The court also explained that in case law,

save one notable exception⁷ for which it thoroughly distinguished, there must be some type of purposeful wrongdoing⁸ demonstrating that the legal title holder of the property was not the intended beneficiary of that property before the court would impose a constructive trust. Id. at 550-51 (emphasis added).

Here, Mr. Cuzdey is claiming that “in good conscience” and “equity” that a seventy-five-year-old widow may not “retain” properties that she and her late husband purchased, she has valid title to, they lived on as husband and wife and paid taxes, made improvements, obtained permits, and in all regards made the property their home for over 30 years, including refinancing the property after Mr. Landes died. Even if this Court was to attempt to apply the most liberal case interpreting constructive trusts to the case at hand, Hestagen, given the documentary evidence presented there is no possible way it could find Mr. Cuzdey’s claims on par with that of the plaintiffs’ claims in that case: Mrs. Landes had no fiduciary duty to Mr. Cuzdey imposed by law to notify him of anything and Mr. Cuzdey—unlike the plaintiffs in Hestagen—had full knowledge and notice of Mr. Landes’

⁷ Hestagen v. Harby, 78 Wash.2d 934, 481 P.2d 438 (1971), extended the equitable powers of the court to its limit and found a constructive trust was appropriate where executor of an estate violated fiduciary duties by not notifying heirs to an estate under the state’s intestacy statute.

⁸ The general rule (and older cases exclusively) that there is fraud shown to the clear, cogent, and convincing evidence. Pitzer, 141 Wash. 2d at 549-51; see also Georges, 20 Wash. 2d at 94 (stating “The essence of an action to establish a constructive trust is fraud”).

death, as well as actual or constructive notice of the community property agreement, recorded with the county over a decade ago. Consequently, Mrs. Landes has sufficiently demonstrated that equity should not convert her into a trustee.

9.3.2.5. Conversion

The tort of conversion is “the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.” Consulting Overseas Mgmt., Ltd. v. Shtikel, 105 Wash. App. 80, 83, 18 P.3d 1144, 1147 (2001).

Here, the documentary evidence demonstrates that Mrs. Landes has lawful justification, i.e., title to all property in this suit, and Mr. Cuzdey is not entitled to possession. See also Davenport, 147 Wash. App. at 722 (conversion requires defendant initially receive property wrongfully).

9.3.2.6. Unjust Enrichment

A claim of unjust enrichment requires proof of three elements: (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff’s expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. Norcon Builders, LLC, v. GMP Homes VG, LLC, 161 Wn.App. 474, 254 P.3d 835 (2011).

Here, Mrs. Landes has title to all property subject to suit, the documentary evidence demonstrates Mr. Cuzdey’s claims of labor and such

are false, and there is no written contract requiring the Landes' to have paid him. Furthermore, the value of property is well over \$200,000.00. (CP 580-81). And if Mr. Cuzdey was compensated 30+ years later, based on nothing but stale allegations, the result will be anything but just. See Norcon Builders, LLC, 161 Wn.App. 474; Johnston, 182 Wash. at 575.

X. ISSUE #7 RESTATED

If considering the merits, whether Mr. Cuzdey's Declaration opposing Mrs. Landes' Second Amended Motion for Summary Judgment raises material issue(s) of law or fact?

10.1. Issue #7 Relevant Facts and Procedural History

See Section 9.1, infra. In addition, Mrs. Landes' original memorandum supporting her original motion for summary judgment, filed on February 27, 2015, had two declarations physically a part of it as exhibits "M" and "N." (CP 10, 72-83). The declarations were from Mrs. Landes and Mrs. Wallen. (CP 72-83). The hearing on summary judgment was noted for May 8, 2015. (CP 1024). This original memorandum was never responded to, never contested or argued at hearing, amended on March 23, 2015, and May 21, 2015 and never reviewed by the Court. (CP 86, 158, 175, 397).

Mr. Cuzdey responded to the Second Amended Memorandum. (CP 208-32). He did not mention either Mrs. Landes' or Mrs. Wallen's declarations attached to Mrs. Landes' original memorandum. (CP 208-32). Mr. Cuzdey did submit a declaration from himself detailing alleged conversations and

transactions with Mr. Landes. (CP 188-203). The hearing on the Second Amended Summary Judgment took place June 19, 2015. (RP 35). At this hearing, Mr. Cuzdey never argued waiver of the Deadman's Statute because of Landes' declarations attached to the original memorandum in support of summary judgment. (RP 35-71).

10.2. Issue #7 Summary of the Argument

The declarations attached to Mrs. Landes' original memorandum supporting summary judgment did not waive the Deadman's Statute because that memorandum was not responded to or contested at hearing, and because that memorandum was amended twice. Moreover, the trial court never reviewed the declarations as they were not before it in the new (Second Amended) Motion, and new hearing date, on summary judgment. In fact, this argument should not be considered on appeal as Mr. Cuzdey never briefed or argued waiver of the Deadman's Statute because of these declarations.

Factual statements argued in the Second Amended Memorandum by Mrs. Landes' attorney are not testimony and cannot waive the Deadman's Statute. Nor can Landes' declarations authenticating documents waive protections of the Deadman's Statute as they were drafted to not include barred testimony and specifically filed for authentication purposes only.

Consequently, Mr. Cuzdey's declaration is barred by the Deadman's Statute. Exceptions to the Deadman's Statute are inapplicable. His declaration is also barred by other evidentiary rules. Arguendo, any admissible statement remaining creates no issue of law or fact.

10.3. Issue #7 Argument

A nonmoving party may not rely on speculation, argumentative assertions, or in having its affidavits considered at face value; rather, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions. Becker, 165 Wash. App. at 246; Harberd v. City of Kettle Falls, 120 Wash. App. 498, 508, 513-14, 84 P.3d 1241, 1246, 1249 (2004) (holding summary judgment appropriate where self-serving affidavit and lack of documentary evidence was presented by non-moving party).

10.3.1. No Waiver of Deadman's Statute via Declaration Attached to Original MSJ

Waiver of the Deadman's Statute's protections occur by introducing or failing to object to testimony at a contested hearing or trial. Estate of Lennon v. Lennon, 108 Wash. App. 167, 176, 29 P.3d 1258, 1264 (2001), as amended on denial of reconsideration (Oct. 2, 2001). Further, an amended motion replaces the original motion:

An amendment which is complete in itself and does not refer to, or adopt, the prior pleading, supersedes it and the original pleading ceases to be a part of the record, being in effect abandoned, or withdrawn, and becoming functus officio, with the result that the

subsequent proceedings in the case are to be regarded as based upon the amended pleading, which will not be aided by anything in the prior pleading, and any ruling of the court with relation to the sufficiency of the original pleading is not properly in the record.

any part of the original . . . [is] abandon[ed]. . . .

See Herr v. Herr, 35 Wash. 2d 164, 166-67, 211 P.2d 710, 712 (1949) (internal punctuation omitted).

Here, the original memorandum for summary judgment with attached declarations was amended before any response, and no contested hearing occurred regarding it. Thus, no waiver of the Deadman's Statute occurred.⁹ See Estate of Lennon, 108 Wash. App. at 176; Herr, 35 Wash. 2d at 166-67. Furthermore, Mr. Cuzdey did not argue the Deadman's Statute was waived on this ground to the trial court, and this argument should either be struck or not be considered on appeal. RAP 2.5(a); Kellar, 172 Wn.App. at 578-79 (holding court would not consider specific theory regarding waiver of Deadman's Statute where not argued below). Mrs. Landes moves to strike or asks this Court to not consider this argument. See id.

10.3.2. No Waiver of Deadman's Statute via Attorney's Argument in a Motion

"Testimony" under the Deadman's Statute is defined as the following:

⁹ Mr. Cuzdey argues that Mrs. Landes should have moved to strike. This makes no sense; amending effectively struck the previous motion, and moving to strike could have easily created a contested hearing causing waiver. Holding otherwise would overturn Lennon, which Mr. Cuzdey has not asked this Court to do.

Evidence given by a competent witness under oath or affirmation; as distinguished from evidence derived from writings, and other sources. Testimony is [a] particular kind of evidence that comes to [a] tribunal through live witnesses speaking under oath or affirmation. . . .

The statute does not expressly prohibit the interested party from introducing documents or other written statements by the deceased which support a claim of ownership of property by the interested party against the deceased's estate.

Wildman v. Taylor, 46 Wash. App. 546, 551, 731 P.2d 541, 544 (1987).

Here, plainly, an attorney's factual statement in a motion is not testimony under the Deadman's Statute and no waiver of the Deadman's Statute can occur. See id.

10.3.3. No Exception to Deadman's Statutes Saves Mr. Cuzdey's Declaration

"One of the major purposes of this legislative enactment is to give protection to the writings and documents of a decedent or persons claiming thereunder, so that decedent's purposes in making a conveyance in writing will not be defeated by parol description of his acts and purposes after his death." Hampton v. Gilleland, 61 Wn.2d 537, 543, 379 P.2d 194, 197 (1963). The statute does so by "prevent[ing] interested parties from giving self-serving testimony about conversations or transactions with the decedent." Erickson v. Robert F. Kerr, M.D., P.S., Inc., 125 Wn.2d 183, 189, 883 P.2d 313 (1994).

Feeling or impression testimony may not directly or indirectly speak to a decedent's past statements or transactions. Dwelley v. Chesterfield, 88 Wash. 2d 331, 334-35, 560 P.2d 353, 355-56 (1977). However, when statements are explicitly introduced for other purposes and “not to show what the transaction[s] had been with the deceased,” no waiver occurs. Boettcher v. Busse, 45 Wn.2d 579, 585 (1954). Similarly, “the identification of a signature upon a writing is not a transaction with the deceased” and no waiver occurs. O'Steen v. Wineberg's Estate, 30 Wash. App. 923, 935, 640 P.2d 28, 35 (1982); see also Jewett v. Budwick, 145 Wash. 405, 406, 260 P. 247, 248 (1927) (citing Goldsworthy v. Oliver, 93 Wash. 67, 69, 160 P. 4 (1916)).

Here, this Court cannot infer by Mr. Cuzdey's declaration that Mr. Landes shared any feelings or impressions that Mr. Cuzdey may have felt, and cannot infer by Mr. Cuzdey's declaration that any feelings or impressions that Mr. Cuzdey may have had were expressed to Mr. Landes. See Dwelley, 88 Wash. 2d at 334-35.

Moreover, because our state follows the “objective manifestation theory of contracts” all of Mr. Cuzdey's claims based on mutual intention of the parties, i.e., oral contract, quantum meruit, and constructive trust, fail because Mr. Cuzdey's “impressions” as expressed in his declaration are either barred as an improper attempt to establish indirectly what he cannot

establish directly (that an oral agreement took place) or “are meaningless when attempting to ascertain the mutual intentions of [himself] and [the decedent, Mr. Landes]” because Mr. Cuzdey’s alleged feelings and impressions cannot be inferred to have been shared by Mr. Landes. See id. at 334-35.

Finally, Landes’ declarations solely introduced to authenticate the documentary evidence, e.g., identify a signature, attached to her Second Amended Memorandum cannot waive the Deadman’s Statute. See e.g., Boettcher, 45 Wn.2d at 585; Goldsworthy, 93 Wash. at 69.

10.3.4. Mr. Cuzdey’s Declaration is Inadmissible Based on Other Evidentiary Rules

Inadmissible evidence is not made admissible by allowing the substance of a testifying witness’s evidence to incorporate out-of-court statements by a declarant who does not testify. State v. Martinez, 105 Wash. App. 775, 782, 20 P.3d 1062, 1067 (2001) overruled on other grounds by State v. Rangel-Reyes, 119 Wash. App. 494, 81 P.3d 157 (2003). “Out-of-court admissions of a party are not admissible as an exception to the hearsay rule when they are self-serving.” State v. Stubsjoen, 48 Wash. App. 139, 147, 738 P.2d 306, 310 (1987).

Here, Mrs. Landes specifically objected to Mr. Cuzdey’s declaration based on hearsay, assuming facts not in evidence, no personal knowledge,

speculation, relevance, and the testimony being ambiguous. (CP 237-38; RP 44-46, 59-62). The trial court inferentially and correctly sustained these objections. (RP 62-70).

10.3.5. Arguendo, Whatever Portion of Mr. Cuzdey's Declaration Deemed Admissible Does Not Raise Material Issues of Law or Fact

Summary judgment is appropriate where reasonable persons could reach but one conclusion. Marincovich v. Tarabochia, 114 Wn.2d 271, 787 P.2d 562 (1990). If the non-moving party fails to rebut the moving party's contentions such that the moving party is entitled to a directed verdict at trial, then the moving party is entitled to a judgment as a matter of law. See Celotex, 477 U.S. at 322-23; Young, 112 Wash.2d at 225-26.

Here, arguendo, if any portion of Mr. Cuzdey's declaration is admissible it is not sufficient evidence to establish issues of law or fact as to necessary elements of any of his claims, including the material elements of a contract, for real estate or otherwise. See e.g., Halbert, 88 Wash. App. at 676-77; Becker, 165 Wash. App. at 246; Harberd, 120 Wash. App. at 508. If anything, admissible portions only demonstrate the ambiguity and unenforceability of Mr. Cuzdey's allegations as the alleged agreement is clearly for over one year in length and contemplates future agreements.

//

//

XI. ISSUE #8 RESTATED

If considering the merits, whether Mr. Cuzdey's son's Declaration opposing Ms. Landes' Second Amended Motion for Summary Judgment raises material issue(s) of law or fact?

11.1. Issue #8 Relevant Facts and Procedural History

In support of his response to Mrs. Landes' Second Amended Motion and Memorandum, Mr. Cuzdey submitted a declaration from his son detailing alleged statements heard by his son when his son was a child.

11.2. Issue #8 Summary of the Argument

Mr. Cuzdey's son's declaration is neither admissible nor reliable evidence and cannot create an issue of law or fact; chiefly, the declaration is essentially unreliable, self-serving, child-hearsay. If any parts are admissible, they support Mrs. Landes' argument that Mr. Cuzdey's claims are unenforceable because the statements are vague, contradictory, and lack evidentiary support for material elements as well as terms to a valid contract or consideration for modification of the alleged original contract.

11.3. Issue #8 Argument

Even if a hearsay statement falls within a hearsay exemption or exception, it cannot be reliable if, when it was made, the declarant was incompetent. See State v. Karpenski, 94 Wash. App. 80, 112, 971 P.2d 553, 570 (1999) abrogated by State v. C.J., 148 Wash. 2d 672, 63 P.3d 765 (2003) (holding "declarant's competency [at the time of his or her hearsay

statement] is a precondition to admission of his hearsay statements as are other testimonial qualifications [e.g., personal knowledge]).”

“In close or arguable situations, it is helpful to remember the general overriding principle that . . . hearsay exception[s are] intended to apply only to statements that are likely to be trustworthy, considering the surrounding circumstances and the context in which they are made.” Thor v. McDearmid, 63 Wash. App. 193, 203-04, 817 P.2d 1380, 1387-88 (1991) (holding statement made was not trustworthy because it was made many years before trial when person recalling statement was 13 or 14 years old).

“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” ER 602. “[A] showing of literal, firsthand knowledge should be required when the testimony goes to a ‘core element’ of the case.” 5A Wash. Prac., Evidence Law and Practice § 602.5 (5th ed.).

Here, Mrs. Landes specifically objected to Mr. Cuzdey’s son’s declaration based on hearsay, assuming facts not in evidence, no personal knowledge, speculation, relevance, and the testimony being ambiguous. (CP 237-38; RP 44-46, 59-62). Notably, Mr. Cuzdey’s son was not competent, due to age, to testify when allegedly hearing statements regarding any alleged oral agreements. (RP 44). Thus, such statements are

inadmissible and not reliable and cannot create a material issue of fact. See citations above.

Arguendo, at best, Mr Cuzdey's son's declaration, if at all admissible, demonstrates the unenforceability of any alleged oral contract: It makes clear that not all necessary terms between Mr. Landes and Mr. Cuzdey were initially discussed, agreed upon, and/or clear. See e.g., Halbert, 88 Wash. App. at 676-77.

Additionally, his declaration claims the initial alleged agreement to sell Mrs. Landes' property for \$10,000.00 morphed into an additional agreement to work off the value of the \$10,000.00 by improving the property. This demonstrates the alleged oral contract is unenforceable. See e.g., Halbert, 88 Wash. App. at 676-77 (holding contemplation of a second contract is enough to render an agreement for the purchase of real property unenforceable); Sea-Van Investments Associates, 125 Wn.2d at 127. This also showcases how Mr. Cuzdey's story makes no sense: Mr. Cuzdey performing work on/improving the very property he was allegedly buying could not compensate, and could not be consideration, for the Landes'.

Finally, Mr. Cuzdey argues that the trial court erred by excluding Mr. Cuzdey's son's testimony under the Deadman's Statute. While Mr. Cuzdey's son's declaration is not affected by the Deadman's Statute, Mrs. Landes' counsel never argued such—at any time—nor did the trial court

ever make any statement to that effect. The trial court simply dismissed the case based on the statute of frauds and the Deadman's Statute. (RP 62-70). Which is one of numerous ways to correctly dismiss this suit, as argued herein. (See RP 62-70).

XII. ISSUE #9 RESTATED

Whether Mr. Cuzdey's Second Amended Complaint was frivolous such to support the trial court's award of attorney's fees to Ms. Landes?

The Revised Code of Washington Section 4.84.185 allows the prevailing party to receive expenses, including attorney fees for opposing a frivolous action. Each of Mr. Cuzdey's claims are frivolous. (See CP 391-92; RP 62-70). For the reasons herein, this Court should affirm.

XIII. ATTORNEY FEES ON APPEAL

Pursuant to RAP 18.1, 18.9, and RCW 4.84.185, Mrs. Landes requests to be awarded attorney fees and expenses for responding to this appeal.

XIV. CONCLUSION

Based on the foregoing, the trial court should be affirmed, on any basis argued herein, and attorneys' fees on appeal should be awarded to Mrs. Landes.

Respectfully submitted this 3rd day of May, 2016,



Drew Mazzeo WSBA No. 46506
Attorney for
Defendant/Respondent/Appellee

TAYLOR LAW GROUP

May 03, 2016 - 3:31 PM

Transmittal Letter

Document Uploaded: 3-479885-Amended Respondent's Brief.pdf

Case Name: Cuzdey v. Landes, et al.

Court of Appeals Case Number: 47988-5

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Amended Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jacque Godden - Email: taylorlawgroup@comcast.net

A copy of this document has been emailed to the following addresses:

drew.taylorlawgroup@outlook.com

KevinHochhalter@cushmanlaw.com

RhondaDavidson@cushmanlaw.com